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STATE WATER RESOURCES CONTROL BOARD

STATE OF CALIFORNIA

IMPERIAL IRRIGATION  
DISTRICT and SAN DIEGO  
COUNTY WATER AUTHORITY,

Petitioners.

**PETITION FOR APPROVAL OF  
LONG-TERM CONSERVED WATER  
TRANSFER AGREEMENT AND  
CHANGE IN POINT OF DIVERSION  
AND PLACE OF USE**



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2	Seven-Party Water Agreement of August 18, 1931
3	Applications by Imperial Irrigation District to Appropriate Unappropriated Water, and Permits Thereon
4	United States and Imperial Irrigation District Contract dated December 1, 1932
5	Agreement of Compromise Between Imperial Irrigation District and Coachella Valley County Water District dated February 14, 1934
6	State of California State Water Resources Control Board Decision 1600
7	State of California State Water Resources Control Board Order 88-20
8	March 28, 1989 Letter from Walter Pettit of the State Water Resources Control Board to Charles Shreves of the Imperial Irrigation District
9	June 29, 1998 letter from SWRCB to IID re conservation program compliance
10	The California Water Plan Update, Bulletin 160-98, Volume 1 [Public Review Draft], cover page and pp. 6-14 to 6-20
11	1996 Memorandum of Understanding Regarding Efficient Water Management Practices
12	Tentative Decision, Statement of Decision and Judgment in San Francisco Superior Court Action

- 13 Notices of Exemption
- 14 Photographs in response to Form Question 7(a), (b) and (c)
- 15 June 23, 1981 letter from Stephanie Bradfield of State Water Resources Control Board to the Honorable Rose Ann Vuich, California State Senate
- 16 Enrolled Bill Report from State Water Resources Control Board regarding AB 3491 dated August 24, 1982
- 17 Bill Analysis of AB 2542 by State Water Resources Control Board dated June 1, 1984
- 18 Bill Analysis of AB 2542 by State Water Resources Control Board dated April 17, 1984
- 19 Bill Analysis of AB 2542 by Department of Water Resources dated March 6, 1984
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- 21 Maps showing existing and proposed places of use
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- 23 Names and address of person(s) taking water from the stream between the present point of diversion or rediversion, and the proposed point of diversion or rediversion, as well as any other person(s) known to IID who may be affected by the proposed change.
- 24 San Diego County Water Authority Water Resources Plan, February 1997

## I. INTRODUCTION

*Implementation of water conservation measures in IID could make a substantial amount of water available for other uses, either within the District or elsewhere.*

-- SWRCB Order WR 88-20, p.9.

The Imperial Irrigation District ("IID") and the San Diego County Water Authority ("Authority") have entered into an historic long term conserved water transfer agreement ("Agreement") which, if implemented, will benefit all Californians. The Agreement calls for the IID to conserve water with funds provided by the Authority and to then transfer the amount of water conserved to the Authority for use within its service area.

This Petition seeks approval of the conserved water transfer under the Agreement from the State Water Resources Control Board ("SWRCB") pursuant to SWRCB Decision 1600; SWRCB Water Rights Order 88-20; Article X, § 2 of the California Constitution; and sections 100, 109, 1011, 1012, 1700 et seq. and 1735 et seq. of the California Water Code.<sup>1</sup> The transfer of conserved water will have a term of 45 years with one optional 30-year renewal; will involve conservation efforts undertaken within the IID in order to allow Colorado River water to be diverted by the Authority for use within its service area, and will involve a change in point of diversion under Permit Number 7643 (Application Number 7482) from Imperial Dam to Lake Havasu.

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<sup>1</sup> All statutory references hereafter are to the California Water Code unless otherwise noted.

By this Petition, the IID and the Authority seek an order of approval from the SWRCB which includes the following findings required by the terms of the Agreement in addition to the findings required by § 1700 et seq. and § 1735 et seq.:

- (A) California law, including §§ 1011, 1012 and 1013, applies to and governs the IID's transfer of conserved water to the Authority, and the IID's water rights are unaffected by the IID's transfer of conserved water;
- (B) The conserved water transferred by the IID to the Authority under the Agreement retains the same priority as if the water had been diverted by and used within the IID;
- (C) The transfer of conserved water by the IID to the Authority under the Agreement is in furtherance of SWRCB Decision 1600; SWRCB Order WR 88-20; Article X, § 2 of the California Constitution; and §§ 100 and 109;
- (D) The transfer of conserved water by the IID to the Authority under the Agreement further establishes the reasonable and beneficial use of water by the IID;
- (E) The quantity of conserved water transferred in each year of the Agreement will be verified by the SWRCB confirming that: (1) the IID is enforcing the contractual duties and obligations of the "Contracting Landowners" within the IID to undertake water conservation efforts; (2)

the IID has undertaken water conservation efforts, if applicable; and (3) the IID's diversions at Imperial Dam (less return flows) have been reduced in an amount at least equal to the quantity of conserved water transferred for each year of the Agreement;

- (F) The IID's reduced diversions at Imperial Dam (less return flows) during the term of the Agreement will be measured by subtracting from 3,100,000 acre-feet per year ("AFY") the sum of [actual diversions (less return flows) of the IID during the applicable year of the Agreement under its priority 3 water right plus the amount of water transferred to the MWD under the IID/MWD 1988 Agreement] and disregarding the actual diversions (less return flows) of the IID during the applicable year of the Agreement, if any, under its priority 6 or 7 water right; and
- (G) To assist the Bureau of Reclamation ("BOR") in the administration of diversions on the Colorado River and to insulate junior right holders from any possible negative impact during the term of the Agreement, the IID will forbear under its priority 3 water right from diverting (less return flows) in excess of 3,100,000 AFY, and from diverting (less return flows) in excess of 90% of the water available under its priority 6 and 7 water right.

Approval of the Agreement on the terms requested will confer substantial benefits to the IID, the Authority, junior right holders and to all of California. The IID will have the funds to undertake

significant new additional water conservation efforts; the Authority will obtain an important long-term source of reliable water, thus reducing its water supply reliability problems resulting from minimal local supplies and almost total dependence on imported supplies from the Metropolitan Water District of Southern California ("MWD"); junior right holders will obtain enhanced reliability as a result of IID's forbearance; and California will make significant progress towards accomplishing its goal of transferring conserved agricultural water to urban areas in short supply and reducing its use of Colorado River water closer to its normal flow legal apportionment of 4.4 million AFY.

The Agreement produces all the above benefits in full compliance with California law, in furtherance of the Legislature's mandate to encourage agriculture-to-urban conserved water transfers, in conformity with the previous orders of the SWRCB, and without harming other legal users of water, including junior Colorado River right holders, or injuring the area of origin. Further, the Agreement provides for the SWRCB to retain jurisdiction to monitor compliance with the Agreement's provisions to create additional conserved water for transfer. Environmental issues and concerns are fully addressed by mandatory CEQA and NEPA compliance prior to the determination of water conservation methods and as a condition to the commencement of any water conservation efforts and the transfer of any conserved water.

This Petition is organized into various sections dealing with particular areas of import, both factual and legal. A documentary appendix ("IID Appendix") is provided which contains full text copies of certain referenced agreements, orders and decisions. The IID and the Authority anticipate supplementing the record before the SWRCB during the approval process and providing all documents

and information the SWRCB requires to approve the proposed transfer of conserved water under the Agreement.

## II. SUMMARY OF AGREEMENT

The Agreement between the IID and the Authority<sup>2</sup>, addresses the following subjects: conditions, transfer mechanism, quantity, term and renewal, pricing, and shortage sharing.

### A. Conditions.

Four major conditions must be satisfied before the Agreement becomes effective:

#### 1. Environmental Review.

First, environmental review must be completed. The IID is designated as the Lead Agency for environmental compliance under CEQA. The IID intends to work in close coordination with the federal lead agency designated for purposes of compliance under NEPA. Article 9 of the Agreement requires the IID and the Authority to complete the environmental review and assessment required by CEQA and NEPA. The transfer of conserved water to the Authority is expressly contingent upon a determination by the IID and the Authority to proceed with implementation of the activities described in the Agreement, which determination will be made only after completion of such environmental assessment and incorporation of any project alternatives and/or mitigation measures which those agencies consider appropriate or which are legally required by any other state or federal agency. The IID is responsible for the mitigation of any environmental impacts of water conservation efforts within Imperial County (excluding the Colorado River between Imperial Dam and the northern county border) and upon the Salton Sea, except that the IID has the right to terminate the Agreement in lieu of implementing such mitigation measures if the present value of projected mitigation expenditures might exceed \$15 million at the time of completion of environmental review. Once water transfers commence, if the present value of the cost to IID of original mitigation obligations and unanticipated environmental consequences combined exceed \$30 million, the IID may void the Agreement and terminate any further transfer of conserved water. The Authority is responsible for the mitigation of any environmental impacts on the Colorado River between Imperial Dam and Lake

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<sup>2</sup> IID Appendix, Tab 1.

Havasu, resulting from the transportation of the conserved water from Imperial Dam to the Authority and for any impacts in San Diego County. The Authority has the right to terminate the Agreement in lieu of implementing such mitigation measures if the estimated mitigation costs exceed \$1 million at the time of completion of environmental review or \$2 million after transfers commence. Each party has a right, but no obligation, to contribute money to pay the other party's costs that exceed the specified limits--in which case, the Agreement would not be terminated. Further detail regarding environmental considerations is provided in Section VIII.

## 2. Wheeling Arrangements.

Second, the Authority must obtain, from the MWD or otherwise, the ability to wheel the amount of conserved water through the MWD's Colorado River Aqueduct ("CRA") to San Diego County. The Agreement specifies a formula for the base wheeling rate based on the amortized capital costs, O&M, replacement costs, and net power costs for the CRA facilities actually used to convey the water. The Agreement also provides that the Authority pay a "supplemental wheeling rate" to the MWD when the wheeling of the conserved water would prevent the MWD from diverting all the flood control releases available to the MWD pursuant to the reservoir operating criteria specified in the 1984 Field Working Agreement between the U.S. Army Corps of Engineers and the BOR. The supplemental wheeling rate may not exceed \$60 per AF. If the wheeling condition is not satisfied, either party may void the Agreement. As with the environmental condition, both parties have a right, but no obligation, to contribute money to pay the other party's share of wheeling costs that exceed the limits--in which case, the Agreement would not be terminated.

## 3. Approval By The SWRCB And The BOR.

Third, the Agreement must receive necessary approvals from the SWRCB and BOR. SWRCB approval must include findings that: (1) §§ 1011, 1012 and 1013 apply to and govern the transfer; (2) the conserved water retains the same priority as if it were diverted and used by the IID; (3) the IID's water rights are unaffected by the transfer; (4) the transfer is in furtherance of earlier SWRCB decisions and orders concerning the IID's reasonable and beneficial water use,

Article X, § 2 of the California Constitution and §§ 100 and 109 ; (5) the water conservation will be verified by the IID reducing its diversions from the Colorado River in the amount of conserved water transferred, and (6) junior right holders will be protected during the term of the Agreement. BOR approval must find: (1) the transfer is consistent with federal law; (2) the BOR will account for the conserved water under the decree as part of the IID's net diversions under the IID's priority for use of Colorado River water; (3) the IID's water rights are unaffected by the transfer; (4) recognition of the SWRCB findings concerning the IID's reasonable and beneficial use of water and SWRCB verification of conserved water, which includes forbearance by the IID of its priority 3 water right at 3.1 million AF during the term of the Agreement; and (5) diversion of the conserved water by the Authority at Lake Havasu is permissible.

4. Landowner Subscription.

Fourth, within 18 months of April 29, 1998, the IID must enter into conditional subscriptions of interest with landowners desirous of participating in on-farm conservation, expressly conditioned on the IID's compliance with environmental laws pursuant to Article 9 of the Agreement. Within 120 days of the IID's certification of the EIR, participating landowners must enter into contracts which commit the landowners to collectively conserve at least 130,000 AFY. The Agreement specifically provides that the contracts with participating landowners will prohibit fallowing as a water conservation method.

B. Transfer Mechanism.

Subject to the terms and conditions of the Agreement, the IID may undertake and agrees to contract with landowners to undertake water conservation efforts and divert less Colorado River water by an amount equal to the conserved water created. The transfer occurs by the IID leaving water in the Colorado River in the amount of conserved water created for the Authority to divert and deliver to its service area. The Authority pays the IID for the quantity of water so transferred.

C. Quantity.

Water will be conserved and transferred pursuant to §§ 1011 and 1012 . The conserved water will retain the senior priority of the IID's water rights. There are two transfer schedules: the primary transfer and a discretionary additional transfer. The primary transfer quantity will commence only after the satisfaction of all four conditions discussed above. The quantity transferred in the first year will be 20,000 AFY, increasing each year by 20,000 AF until a "stabilized primary quantity" (e.g., maximum annual primary transfer) is reached. That quantity is between 130,000 AFY and 200,000 AFY, as determined by the IID in its complete discretion.

A discretionary additional transfer of up to 100,000 AFY may occur, but no sooner than the start of the 11th year. The quantity of the discretionary additional transfer is conditioned upon an IID determination of availability and an Authority determination of need. The discretionary additional transfer is further conditioned by the ability of the IID to include some or all of the additional available water in transfers to settle disputes with the MWD or the Coachella Valley Water District ("CVWD"). The IID may enter into agreements with the CVWD on any terms and conditions acceptable to IID, provided the CVWD covenants not to transfer the water received, directly or indirectly, for use outside the CVWD's jurisdictional boundaries. The IID may enter into agreements with the MWD, provided that either: (1) the MWD permanently waives all existing legal disputes related to the approval conditions under the Agreement, or (2) the MWD pays a price equal to or greater than the price the Authority pays during the same year. The amount of additional water potentially available to the Authority is up to 100,000 AFY, less any amount transferred to the MWD or the CVWD.

During the period of the potential availability of discretionary additional transfers, the IID and the Authority have a mutual right of first refusal. The IID has an exclusion for transfers to the MWD and the CVWD. The Authority has an exclusion for purchases from the MWD and for transfers with other third parties for water quality purposes and drought transactions. The Agreement includes a number of specific criteria for these transactions and limits on the quantity and duration of such transactions.

D. Term And Renewal.

The Agreement has an initial term of 45 years. Subject to a material change provision concerning the continued ability and terms for the cost of conveying the conserved water through the CRA, each party has a unilateral option to renew the Agreement for a single renewal term of 30 years. At the renewal, the IID may recapture up to 34,000 AFY, provided that the IID's 1988 Agreement with the MWD has expired or terminated. The Agreement also includes a meet and confer obligation for the parties to negotiate a potential extension of the Agreement after the end of the renewal term on any terms and conditions acceptable to the parties. At termination of the Agreement, the Authority has no claim to any further conserved water.

E. Pricing.

The Agreement has three pricing provisions: base contract price, shortage premium, and price redetermination. The pricing under the Agreement starts with the base contract price and shortage premium.

The base contract price is determined by a series of formulae which depend on actual MWD rates and charges, the concept of a "base wheeling rate," and the actual wheeling rate for conveying the conserved water through the MWD's CRA to San Diego:

$$\text{Base Contract Price} = (\text{MWD Full Water Rate} - \text{Base Wheeling Rate}) \times (1 - \text{Discount}) \\ + 50\% (\text{Base Wheeling Rate} - \text{Actual Wheeling Rate})$$

The formula for the MWD Full Water Rate is:

$$\text{MWD Full Water Rate} = \text{MWD Rate for untreated noninterruptible water service} + \\ \text{per acre-foot valuation of other MWD rates and charges that vary with} \\ \text{volume} + \\ \text{other MWD rates and charges that do not vary with volume} \div \text{4-year} \\ \text{running average of the Authority purchases from MWD and IID}$$

Certain MWD charges are excluded from the MWD Full Water Rate, including currently assessed property taxes.

The actual wheeling rate equals the base wheeling rate plus a "supplemental wheeling rate" specified in the transportation conditions of the Agreement. The discount starts at 25% in the first year, declines to 15% by the 10th year, and declines to its long-term value of 5% by the 17th year. Here are some sample calculations of the base contract price when the supplemental wheeling rate is not paid:

<i>Assumptions of Sample Calculation</i>	<i>Base Contract Price</i>
Year 1: initial projections of Full MWD Water Rate (\$400 per AF) and Base Wheeling Rate (\$68.50 per AF)	\$249 per AF
Year 10:	
initial projections of full water and base wheeling rates	\$282 per AF
\$10 per AF increase in base wheeling rate	\$273 per AF
\$10 per AF increase in MWD untreated water rate	\$290 per AF

In years when the Authority pays the "supplemental wheeling rate," the base contract price declines by 50% of the supplemental wheeling rate.

The Authority will make an additional "shortage premium" payment over the base contract price when there are significant shortfalls in California water supplies. The payment is made when any one of these three conditions exist:

- Northern California experiences a critical year condition;
- The Secretary of the Interior declares a shortage in the Lower Colorado River Basin; or
- The Authority imposes mandatory rationing or conservation

If the Authority does not impose mandatory rationing or conservation, then the Authority pays a shortage premium equal to 5% if Northern California experiences a critical year condition, 25% for a declared shortage in the Lower Colorado River Basin, or 30% if both conditions prevail. If the Authority does impose mandatory rationing or conservation, then the Authority pays the maximum of the above amount or the premium specified in the table below.

Authority Shortage	Premium
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5% to <10%	10%
10% to <15%	15%
15% to <20%	30%
20% to <25%	40%
25% to <30%	50%
≥ 30%	100%

A price redetermination process will adjust the base contract price and the shortage premium to assure that the pricing provisions reflect the market value of IID water. The adjustments will be based on financial valuations of other transactions that meet a defined set of eligibility criteria. The market value of IID water will be estimated by adjusting the valuations of the other transactions to reflect differences between the IID/Authority transaction and the other transactions (such as supply reliability, water quality, and the time the other transactions were negotiated relative to the date of the price redetermination). The first price redetermination can be no sooner than 10 years after the start of the transfer of conserved water, provided that there are at least 10 transactions meeting the eligibility criteria and the volume in the California market exceeds 240,000 AFY. Thereafter, price redeterminations would generally occur no sooner than every 10 years; however, if a previous redetermination were based on fewer than 15 transactions, the next redetermination could be accelerated once information from more than 20 eligible transactions becomes available.

The pricing provisions of the Agreement are adjusted when a financial valuation of the existing pricing provisions is not consistent with the estimated market value of IID water under the redetermination process. The Agreement includes a defined quantitative criterion for making this determination. The new contract pricing provisions would be a weighted average of the existing price and the valuation of IID water estimated in the price redetermination. The weight given to the price redetermination grows with the scale of transactions in the California water market.

F. Shortage Sharing.

The IID and the Authority will share pro rata any reductions in water available to the IID under its priority 3 right when the Secretary of the Interior declares a shortage in the Lower Colorado River Basin. When the amount of water in usable storage in Lake Mead is less than 15 million AF and the unregulated inflow into Lake Powell is forecasted to be less than 8.8 million AF, the parties will also meet and confer to attempt to negotiate a supplemental water transfer agreement in anticipation of a shortage on the Colorado River of sufficient magnitude to reduce the availability of water to the IID under its senior water rights.

### **III. THE IID'S WATER RIGHTS**

#### **A. IID's California Appropriative Rights.**

The IID's rights<sup>3</sup> to appropriate Colorado River water are long-standing. Beginning in 1885, a number of individuals, as well as the California Development Company, made a series of appropriations of Colorado River water under California law for use in the Imperial Valley. Pursuant to then-existing California laws, these appropriations were initiated by the posting of public notices for approximately 7 million AFY at the point of diversion and recording such notices in the office of the county recorder. The individual appropriations were subsequently assigned to the California Development Company, whose entire assets, including its water rights, were later bought by the Southern Pacific Company. The IID was formed in 1911. On June 22, 1916, the Southern Pacific Company conveyed all of its water rights to the IID.

The IID's predecessor right holders made reasonable progress in putting their pre-1914 appropriative water rights to beneficial use. By 1929, 424,145 acres of the Imperial Valley's approximately one million irrigable acres was under irrigation. Had the IID not subsequently modified its pre-1914 appropriative rights, the IID would have perfected its pre-1914 appropriative water right at over 7 million AFY.

On November 5, 1930, the Secretary of the Interior requested the California Division of Water Resources to recommend a proper method of apportioning the water which California was entitled to receive under the 1922 Colorado River Compact and the Boulder Canyon Project Act.

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<sup>3</sup> IID holds legal title to all its water and water rights in trust for landowners within the District. California Water Code §§ 20529 and 22437; Bryant v. Yellen, 447 U.S. 352, 371 (1980), fn.23.

Thereafter, a number of users and prospective users of Colorado River water, including the IID and the MWD, entered into the Seven-Party Agreement on August 18, 1931. The Seven-Party Agreement provided a schedule of apportionments and priorities, and the parties requested "the Division of Water Resources to, in all respects, recognize said apportionments and priorities in all matters relating to State authority and to recommend the [apportionment and priority provisions] to the Secretary of the Interior of the United States for insertion in any and all contracts for water made by him pursuant to the terms of the Boulder Canyon Project Act. . . ." IID Appendix, Tab 2.

The Seven-Party Agreement states the following apportionments and priorities:

<u>Priority</u>	<u>Description</u>	<u>Acre-feet Annual</u>
1	Palo Verde Irrigation District--gross area of 104,500 acres ) )	
2	Yuma Project (Reservation District) - not exceeding a gross area of 25,000 acres ) )	3,850,000
3a	Imperial Irrigation District and lands in Imperial and Coachella Valleys to be served by AAC ) )	
3b	Palo Verde Irrigation District-- 16,000 acres of mesa lands ) )	
4	Metropolitan Water District and/or City of Los Angeles and/or others on coastal plain	550,000
5a	Metropolitan Water District and/or City of Los Angeles and/or others on coastal plain	550,000
5b	City and/or County of San Diego	112,000
6a	Imperial Irrigation District and lands in Imperial and Coachella Valleys ) )	300,000
6b	Palo Verde Irrigation District-- 16,000 acres of mesa lands )	
7	Agricultural use	all remaining water
	TOTAL	5,362,000

As a result of the Seven-Party Agreement, with respect to the signatory Parties, the IID agreed to limit its California pre-1914 appropriative water rights in quantity and priority to the apportionments and priorities contained in the Seven-Party Agreement. Following execution of the Seven-Party Agreement, the IID filed eight California applications between 1933 and 1936 to appropriate water pursuant to the California Water Commission Act. The IID filed such applications without waiving its rights as a pre-1914 appropriator, and the applications sought rights to the same quantity of Colorado water as had been originally appropriated--over 7 million AFY. However, the applications also incorporated the terms of the Seven-Party Agreement, thus incorporating the apportionment and priority parameters of the Seven-Party Agreement into IID's appropriative applications. Permits<sup>4</sup> were granted on the applications in 1950. A summary of the issued permits is as follows:

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<sup>4</sup> See IID applications and permits, IID Appendix, Tab 3.

<u>PERMIT NUMBER</u>	<u>AFY</u> <sup>5</sup>	<u>PLACE OF DIVERSION</u>	<u>PURPOSE OF USE</u>
7643	7,239,680.25	Imperial Dam	Irrigation and domestic
7649	5,791,744.2	Imperial Dam	Power-related
7648	4,343,808.15	Imperial Dam	Power-related
7647	5,791,744.2	Imperial Dam	Power-related
7646	5,791,744.2	Imperial Dam	Power-related
7645	5,791,744.2	Imperial Dam	Power-related
7644	9,411,584.33	Imperial Dam	Power-related
7651	1,447,936.05	Imperial Dam	Power-related

**B. IID's Contract With The Secretary Of The Interior.**

Pursuant to the provisions of the Boulder Canyon Project Act adopted in 1929, the California Limitation Act<sup>6</sup>, and the Secretary's contracts, California was apportioned 4.4 million AFY out of the lower basin allocation of 7.5 million AFY, plus 50% of any available surplus water. The

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<sup>5</sup> The permits provide rights in cubic feet per second. The conversion to acre-feet is done as follows, with the 10,000 cubic feet per second of Permit 7643 as an example:  $10,000 \times 646,317$  (because 1 cubic foot per second equals 40 statute miner's inches or 646,317 gallons per day) = 6,463,170,000 gallons per day.  $6,463,170,000 \times 365 =$  2,359,057,050,000 gallons per year. 2,359,057,050,000 divided by 325,851 (one acre-foot being equal to 325,851 gallons) = 7,239,680.25 AFY. However, the permits are limited by the terms of the Seven-Party Agreement (discussed above) and the Compromise Agreement (discussed below). In other words, the acre-feet per year numbers are in reality limited to a maximum total of 3.85 million AFY, less water diverted by priority 1 and 2 rights holders under priority 3, and another 300,000 AF under priority 6 and the balance under priority 7.

<sup>6</sup> Act of March 4, 1929; Ch. 16, 48th Sess.; Statutes and Amendments to the Codes, 1929, p. 38-39.

further apportionment of California's share of Colorado River water was made by the Secretary of the Interior by entering contracts with California right holders. The Secretary entered into a permanent service water delivery contract with the IID on December 1, 1932. "The District undertook to pay the cost of the works [Imperial Dam and the All-American Canal], and to include within itself certain public lands of the United States and other specific lands. The United States undertook to deliver to the Imperial Dam the water which would be carried by the new canal to the various lands to be served by it." Bryant v. Yellen, 447 U.S. 352, 360 (1980). The IID's contract with the Secretary incorporated the provisions of the Seven-Party Agreement, as did all the California contracts with the Secretary. Significantly, the IID's contract with the Secretary of the Interior<sup>7</sup> and the Seven-Party Agreement states:

This contract is without prejudice to any other or additional rights which the district may now have not inconsistent with the foregoing provisions of this Article, or may hereafter acquire in or to the waters of the Colorado River.

C. The Subordination By CVWD.

At the time the IID entered into its contract with the Secretary of the Interior, it was anticipated that the lands to be served with Colorado River water in the Coachella Valley to the north would become a part of the IID. However, the Coachella farmers eventually decided that they preferred to have their own delivery contract with the Secretary, and an action was brought by the CVWD to protest the IID's court validation of the 1932 IID water service and repayment contract with

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<sup>7</sup> IID Appendix, Tab 4.

the Secretary of the Interior. In 1934, IID and CVWD executed a compromise agreement<sup>8</sup> which paved the way for CVWD to have its own contract with the Secretary, but which provided that CVWD would subordinate its Colorado River entitlement, in perpetuity, to the IID entitlement. In other words, within the third, sixth and seventh priority agricultural pool, as set forth in the Seven-Party Agreement and the various California water delivery contracts, IID's water use takes precedence over CVWD's use. As a practical matter, under the third priority, CVWD receives what is left over out of the 3.85 million AFY agricultural pool after uses by Palo Verde, the Yuma project, and IID are deducted.

In summary, the IID has senior water rights to the Colorado River established under state law, when California is limited to 4.4 million AFY, in the amount of 3.85 million AFY minus the amounts used by priorities 1 and 2. Although priorities 1 and 2 are not fixed quantities, the average annual use for priorities 1 and 2 (minus return flows) is around 420,000 AFY, leaving approximately 3.4 million AFY for use by the IID.

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<sup>8</sup> IID Appendix, Tab 5.

#### **IV. SWRCB JURISDICTION**

The SWRCB has jurisdiction over this Petition by virtue of California statutes and by virtue of its retained jurisdiction over the IID's conservation activities under both SWRCB Decision 1600 and Order WR 88-20.

##### **A. The SWRCB's Retained Jurisdiction.**

This Petition is the direct result of the SWRCB's previous instructions to the IID to seek opportunities to conserve water and to finance such conservation with funds from urban water transferees, if possible. In SWRCB Decision 1600 and Order 88-20, the SWRCB specified measures the IID was to take to develop a meaningful water conservation plan, including implementing conservation opportunities which could be funded by urban water agencies such as the Authority. The SWRCB expressly retained jurisdiction over the IID to monitor compliance.

##### **1. SWRCB Decision 1600.**

SWRCB Decision 1600 was adopted by the SWRCB on June 21, 1984.<sup>9</sup> At the conclusion of a six-day evidentiary hearing, the SWRCB found that, "the Imperial Irrigation District must take several actions to improve its water conservation program, as specified in this decision."

Decision 1600, p. 2.

The SWRCB in Decision 1600 described why it should compel the IID to improve its water conservation efforts. Specifically, it noted that California is limited to 4.4 million acre-feet of water from the Colorado River when surplus is not available. Id. p. 12. Under such circumstances, the

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<sup>9</sup> IID Appendix, Tab 6.

MWD would be limited to 550,000 AF, less than one-half of its historical diversions.<sup>10</sup> Id. at p. 12.

Thus, "A transfer of conserved water could partially satisfy future Southern California needs." Id. at p.

56. In light of the potential benefits from the transfer of IID conserved water, and after reviewing applicable provisions of the California Constitution and Water Code, the SWRCB chose to exercise and retain its jurisdiction over IID conservation programs.

In fact, Water Code Section 1011 expressly authorizes the sale, lease, exchange or other transfer of water saved through conservation efforts. Under appropriate circumstances, the maximum beneficial use provision of Article X, Section 2 of the California Constitution may mandate the transfer of surplus water to water-short areas.

Id. at pp. 17-18.

The Board reserves jurisdiction in this matter for the purposes of reviewing the adequacy of the required plans and the District actions, to monitor the progress of the District in carrying out the various elements of the water conservation plan, and to take such other action as may be appropriate. The Board will continue to reserve jurisdiction until it determines that the requirements of Article X, Section 2 of the California Constitution are being met.

Id. at pp. 70-71.

## 2. Order WR 88-20.

In 1988, four years after SWRCB Decision 1600, the SWRCB conducted further hearings to review the status of the IID's water conservation program and plans. The SWRCB thereafter issued Order WR 88-20.<sup>11</sup> A central element of Order 88-20 is the prospect for a conserved water transfer by the IID. See pp. 11-13. Evidence was presented by the State Water Contractors showing that a transfer of water from the IID "could increase the supplies available to other

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<sup>10</sup> Indeed, the MWD's right could result in even less than 550,000 AFY because of certain other "rights and claims" as stated in the Decision. Id. at p. 12.

State Water Project (SWP) water users . . . ." Id. at p. 12. The SWRCB found that California would benefit from a conserved water transfer by the IID:

The evidence presented clearly establishes that California water users have a need for substantial additional water supplies and that additional water conservation in IID presents a feasible means of meeting a portion of that demand. . . . The evidence presented at the Board hearing confirms that a transfer of this quantity of water [250,000 acre feet per year] would assist in meeting the identified future demands of California water users.

Id. at p. 14.

However, the SWRCB also found that one of the main problems for IID was funding conservation that would allow such transfers:

The inability of the District to provide or secure adequate funding for its proposed water conservation program, however, has delayed widespread implementation of specified measures.

Id. at p. 18.

One of the likely sources of funding for IID conservation measures identified by the SWRCB was urban areas in need of water, such as the Southern California region. Id. at p. 21. The SWRCB further recognized that the California Legislature had gone "on record" in "favor of promoting voluntary transfers of water or water rights as a means of meeting the State's growing water needs." Id. at p. 39. Specifically, the SWRCB noted that Water Code §§ 1011 and 1012 govern conservation and transfers of water from the IID:

In summary, the California Water Code not only authorizes the voluntary transfer of water made available through implementation of conservation measures, but it actively encourages such transfers and protects the underlying water right of the agency which conserves the water.

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<sup>11</sup> IID Appendix, Tab 7.

Id. at p. 39.

The SWRCB found that the "need for substantial additional water supplies in California and the prospects for substantial water conservation in the IID have been well established." Id. at p. 44. The SWRCB also found that "conservation of 367,900 acre-feet per annum . . . is a reasonable long-term goal which will assist in meeting future water demands." Id.

As a result of the above determinations, the IID was required to complete "an executed agreement with a separate entity willing to finance water conservation measures in Imperial Irrigation District," or take other measures which would achieve equally beneficial results. Id. at p. 45. The SWRCB retained "jurisdiction to review implementation of the initial plan and future water conservation measures." Id. at p. 44 (emphasis added).

### 3. SWRCB Follow-Up.

Subsequent to Order 88-20, on March 28, 1989, in a letter titled, "Compliance with SWRCB Order WR 88-20," the SWRCB found the IID to be "in substantial compliance with. . . Order WR 88-20. . . ." <sup>12</sup> Each year thereafter, the IID's semi-annual reports have been found by the SWRCB to be in compliance with reasonable operating practices for the IID under Article X, § 2, of the California Constitution. As recently as June 29, 1998, the SWRCB confirmed that IID's operations complied with the SWRCB's requirements. <sup>13</sup> The IID's compliance was premised in large part on its participation in the 1988 conserved water transfer agreement with the MWD for approximately 100,000 AFY.

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<sup>12</sup> IID Appendix, Tab 8.

**B. The SWRCB's Statutory Jurisdiction.**

The IID's Colorado River water rights are held as both California pre-1914 appropriative rights and as California permitted appropriative rights. [See Section III re IID Water Rights.] Though § 1706 could arguably allow the IID to change its point of diversion without SWRCB approval (because of the IID's pre-1914 rights), the IID and the Authority jointly make this Petition under §§ 1700 et seq., 1735 et seq. and 1011-1012 based on the IID's permitted appropriative right under Permit 7643. The Petition is made without waiving the IID's pre-1914 appropriative rights (as was noted in Application 7482, and in Permit 7643 itself<sup>14</sup>).

**1. The SWRCB's Statutory Authority.**

The Legislature identifies in §§ 174 et seq. the role of the SWRCB, and in § 179 grants the SWRCB broad powers and jurisdiction over water resource issues. The SWRCB's extensive authority is further detailed in Imperial Irrigation District v. State Water Resource Control SWRCB (1986) 186 Cal.App.3d 1160, 1162-1169. Additionally, the SWRCB's general authority over water matters as applied to this Petition is contained in the California Constitution, Article X, § 2; and in §§ 100, 382, 383, 387, 22228 and 22259.

This Petition is brought for approval of a long-term conserved water transfer involving a change in point of diversion and a transfer of conserved water by the IID for use by the Authority in the

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<sup>13</sup> IID Appendix, Tab 9.

<sup>14</sup> IID Appendix, Tab 3.

Authority's service area under IID Permit 7643.<sup>15</sup> Section 1701 allows such changes "only upon permission of the board." Sections 1702-1705 detail the procedures regarding a petition such as this one. Thus, §§ 1701-1705 are a clear legislative conferral of jurisdiction to the SWRCB to grant approval.

In addition, the Legislature has provided for SWRCB review of long-term transfers such as that proposed between the IID and the Authority in §§ 1735-1737. Section 1735 states:

The board may consider a petition for a long-term transfer of water or water rights involving a change of point of diversion, place of use, or purpose of use. A long-term transfer shall be for any period in excess of one year.

The SWRCB has exercised the jurisdiction granted by § 1735 in the past. See, for example, WR Order 88-12 dated July 6, 1988 (Yuba County Water Agency, Petitioner), regarding a transfer of 185,000 AF of water.

Equally important, the Legislature granted the SWRCB authority to impose reporting requirements on transferors seeking to transfer conserved water pursuant to § 1011, and to require such transferors to comply with other laws regarding changes in point of diversion or place of use. The legislative mandate to the SWRCB to promote the transfer of conserved water while protecting the water rights of transferors, legal users of water, areas of origin and the environment, coupled with the SWRCB's extensive role in governing California's water rights, equates to SWRCB jurisdiction over the approval of this Petition on the terms requested.

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<sup>15</sup> See Section III.

## 2. Federal Law Does Not Preempt SWRCB Jurisdiction.

Some opponents of the proposed conserved water transfer between the IID and the Authority have contended that SWRCB jurisdiction and California's interest in the transfer is preempted by the federal government's control of the Colorado River. This is not correct. California law governs the use and distribution of water received from federal Colorado River projects within California, unless California law is in direct conflict with federal law. This key principle has been stated numerous times and by various courts. For example:

- ◆ **U.S. Supreme Court:** California v. United States, 438 U.S. 645, 653 (1978).

("The history . . . is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." Also, at 675: "Congress intended to defer to the substance, as well as the form, of state water law."; and at 664: "The projects would be built on federal land. . . construction and operation . . . would be in the hands of the Secretary of the Interior. But the Act clearly provided that state water law would control in the appropriation and later distribution of the water.")

- ◆ **Ninth Circuit Court of Appeals:** U.S. v. SWRCB, 694 F.2d 1171, 1177 (9th Cir. 1982) ("[A] state limitation or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purpose with an important federal interest served by the Congressional scheme."). U.S. v. Alpine Land and Reservoir Co., 878 F.2d 1217, 1223 (9th Cir. 1989) ("State law governs the validity of transfers of water rights.")

- ◆ **California Supreme Court:** Environmental Defense Fund v. East Bay Mun. Utility Dist. (1980) 26 Cal.3d 183, 192 ("California may impose any condition not inconsistent with Congressional directive . . . absent conflict with congressional directive, state law must be complied with in the 'control, appropriation, use, or distribution of water.'").
- ◆ **California Court of Appeals:** U.S. v. SWRCB (1986) 182 Cal.App.3d 82, 136 ("[T]he Board was fully authorized to impose the challenged water quality standards or conditions, a regulatory exercise which we determine to be consistent with congressional directives.").

Federal law concerning the Colorado River is not inconsistent with California law promoting the transfer of conserved water, and California law and the SWRCB's exercise of jurisdiction are therefore not preempted. The U.S. Supreme Court has declared that the power of the Secretary of the Interior to contract for Colorado River water deliveries is to be influenced by state law:

Section 18 plainly allows the states to do things not inconsistent with the Project Act or with federal control of the river. . . ."

Arizona v. California, 373 U.S. 546, 588 (1963).

[I]t bears emphasizing that the § 6 perfected right is a water right originating under state law. In Arizona v. California, we held that the Project Act vested in the Secretary the power to contract for project water deliveries independent of the direction of § 8 of the Reclamation Act to proceed in accordance with state law and of the admonition of § 18 of the Project Act not to interfere with state law. 373 US, at 586-588, 10 L Ed 2d 542, 83 S.Ct 1468. We nevertheless clearly recognized that § 6 of the Project Act, requiring satisfaction of present perfected rights, was an unavoidable limitation on the Secretary's power and that in providing for these rights the Secretary must take account of state law. In this

respect, state law was not displaced by the Project Act but must be consulted . .

. .

Bryant v. Yellen, 447 U.S. 352, 370-371 (1980).

On November 24, 1922, representatives of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming signed the Colorado River Compact ("Compact"), which divided the Colorado River Basin into an Upper and a Lower Basin and provided for an apportionment of part of the waters of the Colorado River system between these two Basins. Pursuant to Article III of the Compact, the Lower Basin States (Arizona, California and Nevada) received the exclusive beneficial consumptive use of 7.5 million AFY, "which [was to] include all water necessary for the supply of any rights which may now exist." In addition, the Lower Basin was given the right to increase its beneficial consumptive use by one million AFY.

The Compact made clear that it did not "interfere with the regulation and control by any State within its boundaries of the appropriation, use, and distribution of water." Art. IV(c). In addition, Article VIII provided that "present perfected" water rights were not affected:

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this Compact.

Section 8 of the Reclamation Act of 1902 ("Reclamation Act") also ensures that state law governing water rights must be honored:

[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of the Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383.

"Reclamation law" is defined as the Reclamation Act of 1902 as well as "all Acts amendatory or supplementary thereto." 43 U.S.C. § 371(b). One such supplementary act is the Boulder Canyon Project Act ("Project Act") which specifically authorized the construction of Hoover Dam on the lower Colorado River, as well as the construction of the All-American Canal which connects Imperial Dam with the Imperial and Coachella Valleys.

The Project Act authorized the Secretary of the Interior to enter into storage and water delivery contracts "for irrigation and domestic uses, and generation of electrical energy" at rates which would allow the federal government to recover its construction, operation and maintenance expenses.

43 U.S.C. § 617d.<sup>16</sup>

Section 6 of the Project Act provided that the Hoover Dam and Reservoir should be used for the satisfaction of present perfected rights pursuant to Article VIII of the Compact. 43 U.S.C. 617e. Similarly, Section 18 of the Project Act provided that state law still had a major role to play:

Nothing herein shall be construed as interfering with such rights as the States had on December 21, 1928, either to the waters within their borders or to adopt such policies and enact such laws as they deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River Compact or other interstate agreement.

43 U.S.C. § 617q.

Section 4 of the Project Act provided that should less than all of the signatory states ratify the Compact, the Project Act could still become effective if California would unconditionally agree

to restrict its share of the waters apportioned to the Lower Basin States to 4.4 million AF of water plus one-half of any unapportioned excess or surplus water. Though Arizona initially failed to ratify the Compact, California agreed to this restriction through the California Limitation Act of 1929, and the Compact and Project Act took effect.

In Arizona v. California, 373 U.S. 546, 580 (1963), the Supreme Court held that, through the contract powers which the Project Act gave the Secretary of the Interior, Congress intended to grant the Secretary the power "to carry out the allocation of the waters of the main Colorado River among the Lower Basin States," and that this power was properly exercised when the Secretary entered into water delivery contracts with right holders in the three Lower Basin states. The Supreme Court subsequently entered its 1964 decree ordering the Secretary of the Interior to provide California with 4.4 million AF of water and, if there were any excess mainstream water available, to release half of that surplus for use in California. 376 U.S. 340 at 342.

Pursuant to the terms of the Project Act, this 4.4 million AF of mainstream water was to be used to satisfy "any rights which existed on December 21, 1928." Such "rights" included "present perfected rights" within the IID's pre-1914 state-law appropriative water rights. The original Supreme Court decree (Arizona v. California, 376 U.S. 340, 341 [1964]) gives the following definitions:

(G) 'Perfected right' means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the

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<sup>16</sup> Section 1 of the Project Act provided that "no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial and Coachella Valleys. . . ." 43 U.S.C. § 617.

reservation of mainstream water for the use of federal establishments under federal law whether of [sic] not the water has been applied to beneficial use;

(H) 'Present perfected rights' means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act . . .

A supplemental decree by the Supreme Court quantified the present perfected rights of a number of parties, including IID. Arizona v. California, 439 U.S. 419 (1979). That decree defined the IID's present perfected rights as the right to water:

in annual quantities not to exceed (i) 2,600,000 acre-feet of diversions from the mainstream or (ii) the consumptive use required for irrigation of 424,145 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901.

Id. at 429.

The Supreme Court observed that the Secretary had no ability to impair present perfected rights:

One of the most significant limitations in the Act is that the secretary is required to satisfy present perfected rights, a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective.

Arizona v. California, 373 U.S. 546, 584 (1963) (emphasis added.)

The concept of the IID's "present perfected" rights is not a limit on the IID's Colorado River state law rights, but is rather a quantification of that portion of the IID's overall state appropriative rights that have priority benefits as a "present perfected" right. The IID has state water rights which encompass its "present perfected right," and all its state law rights are accorded deference by related federal Colorado River law unless expressly or implicitly inconsistent with federal law. California's conserved water transfer policy, including permitting changes in points of diversion and place of use, is not inconsistent with federal law and is thus not preempted. The SWRCB therefore, with jurisdiction

over all permitted state appropriative rights, has jurisdiction over IID's proposed long-term transfer of conserved water to the Authority.

**V. IID’S PROPOSED CHANGES TO PERMIT 7643**

The IID has obtained the following permits<sup>17</sup> to appropriate water from the Colorado

River:

<u>PERMIT NUMBER</u>	<u>ACRE-FEET PER YEAR</u> <sup>18</sup>	<u>PLACE OF DIVERSION</u>	<u>PURPOSE OF USE</u>
7643	7,239,680.25	Imperial Dam	Irrigation and domestic
7649	5,791,744.2	Imperial Dam	Power-related
7648	4,343,808.15	Imperial Dam	Power-related
7647	5,791,744.2	Imperial Dam	Power-related
7646	5,791,744.2	Imperial Dam	Power-related
7645	5,791,744.2	Imperial Dam	Power-related
7644	9,411,584.33	Imperial Dam	Power-related
7651	1,447,936.05	Imperial Dam	Power-related

This Petition pertains only to Permit 7643. All the other permits are for power applications, and IID does not petition to change anything regarding these permits.<sup>19</sup>

As to Permit 7643, IID is petitioning for a change in the point of diversion and for use of conserved water within the Authority service area. No change in the purpose of use or place of use is occurring within the meaning of § 1011. The current place of use under Permit 7643 is as follows:

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<sup>17</sup> See IID applications and permits, IID Appendix, Tab 3.

<sup>18</sup> See fn.5 above.

<sup>19</sup> Permits 7644 and 7651 were granted to co-applicants IID and CVWD.

East Mesa	219,010 acres
East Mesa No. 1	640 acres
East Mesa No. 2	360 acres
West Mesa	122,225 acres
Superstition Mesa	9,630 acres
Kane Springs Mesa	5,565 acres
Borego Mesa	1,565 acres
Pilot Knob Mesa	20,895 acres
Imperial Irrigation District	<u>612,658 acres</u>
	992,548 acres

See IID Appendix, Tab 3, Permit 7643.

**A. Point Of Diversion.**

IID currently diverts water under its appropriative Permit 7643 at Imperial Dam. The Agreement calls for the Authority to divert water at Lake Havasu in an amount equal to the conserved water created by the IID. Diversion at Lake Havasu is necessary to enable the Authority to transport the water through the Colorado River Aqueduct ("CRA") for delivery to the Authority's service area.

Possible environmental impacts from this change in point of diversion will be considered and evaluated in the CEQA/NEPA compliance process. See Section VIII regarding environmental considerations. The Agreement will not be implemented until the environmental review process required by CEQA/NEPA has been completed and the parties have determined to proceed with implementation of the Agreement after considering the environmental impacts, project alternatives and mitigation measures.

**B. Purpose of Use.**

Permit 7643 allows the IID to use the appropriated water for irrigation and domestic purposes. Such uses encompass agricultural, municipal and domestic end uses. The consumptive use

from these differing uses is virtually identical since all deliveries by the IID to users in the Imperial Valley have no return flows to the Colorado River or to any other Colorado River water right holder.

The Authority wholesales water to its member agencies, which agencies include the City of San Diego and other local water districts. The Authority will also be delivering the transferred water for end use for municipal, domestic and agricultural purposes. Pursuant to the provisions of Water Code § 1011, a transfer of conserved water resulting in a reduced usage by the IID is deemed a reasonable beneficial use of water by the IID. Therefore, no factual or legal change in purpose of use is occurring.

**C. Place Of Use.**

Section 1011 specifies that IID conservation efforts are deemed a reasonable beneficial use of water by the IID. Thus, if the "use" is by the IID, the location of the use is legally still in the IID. See Section IX. However, even in the absence of § 1011, the IID, as a California appropriator, would have a legal right to seek a change in the place of use of its appropriated water so long as other legal users of water were not adversely affected. See § 1702. Enactments such as §§ 1011 and 1012 are merely extensions of the long-standing principle that an appropriator can change the point of diversion and place or purpose of use if other legal users of water are not injured. Thus, the Petition is brought (in the alternative) as a change of place of use petition to the extent that though legal "use" is still in the IID under § 1011, the practical result is new water being "used" in the Authority's service area.

The common law of California regarding the right of an appropriator to change place and purpose of use is stated in Orange County Water District v. City of Riverside (1959) 173 Cal.App.2d 137, 195:

It has often been held that an appropriator may at his discretion change the place of application of his water, though not where the change causes injury to those

having superior rights. [Citations.] It has likewise often been held that an appropriator of water may at his discretion change the use to which his water is put, provided it continues to be devoted to some legitimate beneficial use, and provided the change in its use does not injure those having superior rights. [Citations.]

The rules regarding change of place and purpose of use have now been codified in the Water Code. Sections 1700-1705.5 allow a person with an appropriative right "under the Water Commission Act or this code" to change place and/or purpose of use with permission from the SWRCB. To establish a change of place or purpose of use in such circumstances, the appropriator must show that the "change will not operate to the injury of any legal user of the water involved." § 1702. If the appropriative right is one "other than under the Water Commission Act or this Code," such as is also the case with the IID, the appropriator may unilaterally change the place or purpose of use "if others are not injured by such change." § 1706.

In other words, both kinds of IID presently held appropriative rights (pre- and post-1914) allow change of place or purpose of use if there is no injury to other water right holders. Here, the proposed transfer will not affect the rights of other Colorado River users, since only conserved water will be transferred and no other Colorado River right holders depend on the IID user return flows or carriage water. See Section VII. Thus, even absent § 1011, which provides that conservation efforts by the IID constitute a reasonable beneficial use by the IID, the IID could still seek a change in the place and purpose of its use provided no injury to other legal users occurs.

**D. Use By the Authority is Appropriate.**

As the transferee, the Authority's use of the conserved water will comply with all the provisions of Division 2 of the Water Code and be consistent with Article X, § 2 of the California Constitution and the public interest.

The Authority proposes to put the conserved water to domestic, municipal and irrigation uses within San Diego County. Population projections and projected water supply requirements for the Authority are summarized in its Water Resources Plan ("Authority Resource Plan") which was adopted in 1997. (See IID Appendix, Tab 24.)

The Authority's Resource Plan identifies a mix of future water supplies comprised of core transfers, local water supplies, water conservation and continued purchases from MWD to satisfy approximately 870,000 AFY of anticipated demand by the year 2015. (Authority Resource Plan E-S2.) The respective quantities are as follows: core transfers, 200,000 AFY; local supplies, 120,000-165,000 AFY; water conservation, 82,000 AFY; and up to 467,000 AFY from MWD. (Authority Resource Plan ES-5.)

San Diego County lacks abundant local water resources and has been historically dependent upon imported water to meet most of its water requirements. There are no significant groundwater supplies or local streams that may reasonably be developed to meet the region's identified water demands. In some years, as much as 90% of the water supply requirements in San Diego County have been satisfied by purchases of imported water from MWD. (Authority Resource Plan 3-1.) However, because the region does not have a substantial local or independent water supply source on which it can rely, reductions in the MWD supply during periods of drought have severely impacted the economy of San Diego County. For example, from December of 1990 through February of 1992, the San Diego region endured reductions of 31%. Had the drought continued, the area may have been faced with shortages as high as 50%. (Authority Resource Plan ES-1.) Accordingly, one of the benefits of this transfer will be to temper the Authority's reliance on MWD and to improve the Authority's over all water reliability.

The Authority is a leader in water efficiency and this transfer will not lessen its commitment to water conservation programs, including water re-purification and water recycling. The Authority is a signatory to the Memorandum of Understanding Regarding Urban Water Conservation in California and is in full compliance with the Best Management Practices (BMPs). These BMPs for water conservation are a component of the Authority Resource Plan and are anticipated to produce water savings of approximately 82,000 AFY for the Authority by the year 2015.

## **VI. THE IID'S REASONABLE AND BENEFICIAL USE**

### **A. The IID's Quantity Of Use.**

As noted elsewhere, the IID has a quantified appropriative water right which is based on irrigation and domestic needs (with flexibility up to certain maximum quantities under priority 3 and priority 6 and 7 of the incorporated Seven-Party Agreement). The IID's annual water use fluctuates for many reasons, including agricultural market conditions, the amount and timing of rainfall, and the salinity of Colorado River water. Stronger economic conditions in crop markets increase the use of Colorado River water by bringing more acreage into production. Less rainfall means that more Colorado River water must be used to grow crops. Higher salinity means that more Colorado River water is used to leach salt from the soil. Additionally, different types of crops require differing amounts (and methods) of irrigation.

The IID's diversions (less return flows) reached a ten-year low of 2.62 million AF in 1992 (inclusive of diversions by MWD under the 1988 IID/MWD Agreement), when whitefly infestation devastated major crops in the Imperial Valley. The IID's diversions (less return flows) reached new highs of 3.22 million AF in 1996 and 3.27 million AF in 1997 (inclusive of diversions by MWD under the 1988 IID/MWD Agreement), due to strong economic conditions in crop markets, below normal rainfall, and changes in salinity of Colorado River water.

### **B. The IID's Extensive Distribution And Drainage System.**

The IID's irrigation system includes the 82-mile All-American Canal, as well as 1,675 miles of other canals which serve about 5,600 headgates. In addition to the canals, the IID manages 10 regulating reservoirs. The drainage system in the Imperial Valley has over 1,400 miles of

drain ditches and another 33,600 miles of tile drains which underlie cultivated fields. The flows from the surface and tile drains ultimately go into the New River or the Alamo River, or directly into the Salton Sea. Though the IID operates the distribution system and the off-farm drainage collection system, tile drains and tailwater discharge systems are operated by land owners.

Water orders and deliveries by the IID require substantial management effort. The IID places orders each week with the BOR for water from primary storage at Lake Mead. These orders are typically placed about five days before the beginning of the week in which the deliveries are requested. However, farmers order water from the IID only one to two days in advance of delivery. Therefore, the IID has to estimate its water needs when placing its orders with the BOR up to ten days before the farmers' requests.

In making its deliveries, the IID diverts water from the main canals to laterals, and then to headgates. Virtually the entire flow--from the diversion at Imperial Dam to delivery at the headgate to drainage into the Salton Sea--is by gravity. Once the IID has diverted water into the All-American Canal, there is only a small amount of storage (0.1% of annual diversions) available to regulate delivery of the water supply within the IID. All headgate deliveries and tailwater outflow are measured at regular intervals during delivery periods by Zanjeros (ditch riders) who open and close headgates and adjust lateral canal checks and gates to deliver water orders at the specified times and flow rates. Therefore, the IID must estimate its water needs very carefully. Due to the many complexities of this gravity open canal delivery system the IID cannot perfectly control the water, even under ideal conditions, such that all deliveries are met without any water discharges at the end of the canals. Nonetheless, despite such

unavoidable constraints, IID delivers over 90% of the Colorado River water it diverts to its users. The water that is not delivered includes losses from evaporation, seepage, and operational spills.

C. The IID's Efficiency Record.

The most important measure of irrigation water use within an irrigation project is irrigation efficiency. The California Department of Water Resources ("DWR") suggests that by the year 2020 on-farm irrigation efficiency in California should approach 73%. IID Appendix, Tab 10, p. 6-16. However, the on-farm irrigation efficiency of the IID is already about 79%, while its conveyance and distribution efficiency is about 90%. By the DWR's account, 73% on-farm efficiency might be generally achieved in California by the year 2020. Thus, the IID is more than 20 years ahead in achieving the target on-farm irrigation efficiency. In fact, the IID's on-farm irrigation efficiency is one of the highest in the state and nation.

In some areas of the State, agencies such as Westlands Water District, Kern County Water Agency, and Imperial Irrigation District generally have on-farm efficiencies ranging from 75 percent to more than 80 percent.

Id. at p. 6-15.<sup>20</sup>

The on-farm irrigation efficiency of the IID is higher, for example, than two nearby irrigation districts that also use Colorado River Water (Wellton-Mohawk and CVWD), meaning the ratio of water used by the plants to the amount of water delivered to the headgate is lower in those two

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<sup>20</sup> The DWR Update also notes that to raise efficiency in the Colorado River region, conservation costs are high. To increase from 73% efficiency to 76% will cost about \$100 per AF; to go to 78% will cost about \$250 per AF; and to go to 80% would cost about \$450 per AF. IID Appendix, Tab 10, p. 6-16.

districts than within the IID. In other words, both CVWD and Wellton-Mohawk lose more water than the IID relative to the respective amount of water delivered to the farms.

The IID's on-farm and conveyance efficiencies are high largely due to the fact that IID and its farmers have historically invested money and resources to rehabilitate and modernize irrigation systems in an effort to improve water management. Farmers have lined ditches, leveled farm land, and implemented many water management measures. Over the past 50 years, farmers have made a large investment in time and money to conserve water within the IID. Collectively, farmers have spent about \$340 million (in 1996 equivalent dollars) to improve delivery and on-farm irrigation efficiency, resulting in an estimated annual savings of 385,000 AFY. Although the IID's on-farm irrigation efficiency is already very high compared to other districts, the revenues to be generated by the proposed IID/Authority transfer will enable the IID and its farmers to employ new irrigation methods and technologies to further improve their efficiency.

**D. The Efficient Water Management Practices Memorandum Of Understanding.**

The IID has been at the forefront of agricultural water conservation. For example, the IID was one of the first agricultural agencies to sign the 1996 Memorandum of Understanding Regarding Efficient Water Management Practices ("MOU"). IID Appendix, Tab 11. The MOU creates the Agricultural Water Management Council, which will be in charge of implementing the MOU, analyzing local water management plans, and overseeing cost-effective and efficient water management practices. Over 29 water suppliers serving about 2.8 million irrigated acres have now also signed the MOU. DWR Update, IID Appendix, Tab 10, p. 6-14.

E. The Jensen Report.

In the early 1990's, the BOR commissioned several studies by Marvin E. Jensen to evaluate water use in the IID. Mr. Jensen issued various reports (collectively "Jensen Report") which concluded that the IID was not effectively utilizing its water diversions from the Colorado River. Opponents of the proposed transfer between the IID and the Authority will no doubt cite the Jensen Report as grounds to disapprove the transfer. However, the Jensen Report is fundamentally flawed. The IID's total diversions did not decline after implementation of the IID/MWD 1988 conservation agreement. The Jensen Report mistakenly relies on this fact to conclude that the IID must therefore have become less efficient. This false conclusion is predicated upon an assumption that water conservation efforts in the IID must result in reduced diversions of Colorado River water by the IID. In reality, the IID's diversions depend on a variety of factors which the Jensen Report ignored, such as increased salinity of Colorado River water (requiring leaching of soil with extra water), varied cropping and market conditions, and rainfall. Additionally, the Jensen Report ignored the fact that the IID's Colorado River water rights are legally flexible (see Sections III and IX), and diversions may lawfully increase with the IID's increasing irrigation needs in any given year, even if new verified conservation is in place.

F. The IID Is Willing To Limit Diversions To Expedite Approval Of The Transfer.

Even though the IID has diverted (less return flows) 3.22 and 3.27 million AF of Colorado River water in the past few years (inclusive of diversions by MWD under the 1988 IID/MWD Agreement), the IID is willing to forbear diverting more than 3.1 million AF of its priority 3 entitlement, inclusive of the transfer of conserved water to MWD under the 1988 transfer agreement, so

that junior right holder CVWD can benefit by enhancing the reliability of its priority 3 and priority 6 water in order to make available to CVWD in priority 3 the 10-year average use of Colorado River water.<sup>21</sup>

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<sup>21</sup> CVWD's average annual diversion of Colorado River water over the past decade has been approximately 330,000 AFY, consisting of approximately an average of 270,000 AFY of priority 3 and 60,000 AFY of priority 6 water.

## **VII. JUNIOR RIGHT HOLDERS WILL NOT BE HARMED**

No Colorado River right holders will be harmed by the Agreement. The IID will be transferring newly conserved water to the Authority. Those senior to the IID in the priority scheme will continue to take the same amount of water, as will those junior to the IID. Ignoring for illustration purposes only All-American Canal return flows and transfers to MWD under the 1988 IID/MWD Agreement, consider the following hypothetical example: suppose in the year 2010 the IID would divert 3.1 million AFY of water in the absence of new conservation. Suppose further that by using funds from the Authority new conservation can produce 200,000 AFY of water. The IID would transfer an amount equal to the new 200,000 AFY to the Authority and reduce its diversions from the Colorado River by 200,000 AFY to 2.9 million AFY. Junior right holders such as CVWD and MWD are unaffected by the conservation/transfer because the combined IID/Authority total diversion does not increase and, but for the conservation, 3.1 million AFY would have been diverted and used by the IID.

### **A. SWRCB Need Only Consider Whether the Transfer Will Cause Injury to "Legal Users Of Water."**

Sections 1702, 1707, 1725 and 1736 all provide for approval of petitions by an appropriator to change place of use, purpose of use, or point of diversion if the change (a) "will not operate to the injury of any legal user of the water involved" (§ 1702); (b) "will not unreasonably affect any legal user of water" (§ 1707); (c) "would not injure any legal user of the water" (§ 1725); and (d) would "not result in substantial injury to any legal user of water" (§ 1736).

The SWRCB has found that this "no-injury" condition protects only those who have a right to use the water, and not every person in the state. In response to the Merced Irrigation District's request to transfer 7,500 AF of water to the BOR under §§ 1707 and 1725, the South Delta Water

Agency ("SDWA") contended that it was entitled to protection under the "no-injury" language of §§ 1707 and 1725. SWRCB Order WR 98-01 at p. 1. The SWCRB disagreed, finding that SDWA was not a "legal user of water" within the meaning of the statutes and consistent case law:

SDWA argues that it does not need a legal right to use the water in order to be injured within the meaning of Water Code sections 1707 and 1725 et seq., and that the common law cases do not apply. We do not agree. [FN2] The statutory no-injury rule codifies the common law no-injury rule. (See Water Code section 1706; Code Commission Notes to Water Code section 1700; Final Report, Governor's Commission to Review California Water Rights Law (1978) at 64-65.) Accordingly, the no-injury rules under Water Code sections 1702, 1706, 1707, 1725, and 1727 all should be interpreted consistently with the case law.

Id. at p. 7.

We conclude, however, that the requirement that a transfer not injure any legal user of water does not extend protection to persons or interest[s] who have no legal right to use of the water.

Id. at fn.2.

SDWA could not object on "no-injury" grounds. It had no legal right to use the water and therefore was not a "legal user of water" under the terms of the relevant statutes.

This inherent legislative limitation of the term "legal user of water" is important in the context of this proceeding. Even "legal users of water" can only properly object if there is injury to the quantity or quality of water available to them under their water right. For example, the MWD contended in its recent lawsuit against the IID that because it might "lose sales" to the Authority if the transfer went through, it was an "injured" party who could protest the transfer. Judge Laurence Kay of the San Francisco Superior Court agreed with the SWRCB's earlier interpretation that the term "legal

user of water" was not meant to apply in the manner contended by the MWD. IID Appendix, Tab 12, pp. 10-12.<sup>22</sup>

B. No "Legal Users Of Water" Will Be Injured.

Accordingly, only holders of legal rights to use Colorado River water could object to the IID-Authority transfer on "no-injury" grounds. Further, only legal users of water with rights subordinate to IID could conceivably complain, since senior right holders will continue to receive their full diversion whether or not the IID-Authority transfer is approved and implemented. CVWD is a junior right holder that has indicated that it likely will object. Among the objections CVWD is likely to assert is that it will suffer injury as a result of the transfer.

First, however, CVWD must establish the four corners of its own water right, including a showing that it is using water reasonably and beneficially (despite its on-farm efficiency being substantially less than the IID's). Furthermore, whatever the extent of CVWD's reasonable and beneficial use, its water right is subordinate in priority to the IID's third priority right as a result of the 1934 Compromise Agreement. CVWD (or any junior right holder) will not be able to demonstrate substantial injury to its water right as a result of the proposed transfer because:

1. It will have the same amount of water available to it before and after the transfer;
2. It does not rely on any IID return flow to the Colorado River (virtually all of the IID's tailwater ultimately empties into the Salton Sea);

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<sup>22</sup> MWD has appealed Judge Kay's decision.

3. There will be no negative "carriage water" impact for CVWD (the IID will continue to divert millions of acre-feet of Colorado River through the All-American Canal); and

4. The transfer will not cause CVWD to overdraft its groundwater basin, given that CVWD has been allowing such overdraft for decades.

## **VIII. ENVIRONMENTAL CONSIDERATIONS**

### **A. Environmental Process Summary.**

An environmental assessment of the project described in the Agreement will be prepared in compliance with the California Environmental Quality Act ("CEQA") [Pub. Res. Code §§ 21000 et seq.] and the implementing regulations ("State CEQA Guidelines") [Cal. Code of Regulations §§ 15000 et seq.]. Pursuant to the Agreement, the IID will serve as the "Lead Agency" and the Authority will be a "Responsible Agency" for purposes of compliance with CEQA.

The IID anticipates that compliance with the National Environmental Policy Act ("NEPA") [U.S.C. §§ 4321 et seq.] will also be required and that a joint EIR/EIS will be prepared in order to satisfy these requirements, subject to approval of this concurrent approach by the affected federal agencies. The environmental review process requires consultation by the IID with all affected state and federal agencies, including the SWRCB as a Responsible Agency. The IID will seek the comments and participation of such entities throughout the environmental review process.

The IID staff is presently preparing an Initial Study pursuant to the State CEQA Guidelines, which will assist the IID in identifying potentially significant impacts created by the project, including any impacts that would result from the SWRCB's actions pursuant to this Petition. In addition, the IID has issued a Request for Qualifications and is finalizing a Request for Proposals to hire an environmental consultant to assist with the environmental assessment and the preparation of all required environmental documents. After the consultant is hired and the Initial Study is completed, the IID will issue a Notice of Preparation (and Notice of Intent if it is determined that a joint EIR/EIS will be prepared), and then conduct an extensive scoping process. This scoping process will promote

participation by the public and federal and state agencies, including the SWRCB, and will enable the IID to determine the scope and depth of the EIR (or joint EIR/EIS) to be prepared.

Based upon the results of the scoping process, the IID will prepare and circulate a draft EIR (or joint EIR/EIS) for review and comment. After completion of the comment period, a final EIR (or joint EIR/EIS) will be prepared. The final EIR (or joint EIR/EIS) must be reviewed and certified by the IID as the Lead Agency, and it must be considered by the IID in determining whether to implement the project. The EIR (or joint EIR/EIS) must also be considered by the SWRCB and each other Responsible Agency prior to granting any approval for the project.

B. Answers To SWRCB Form Questions.

1. Description Of Changes To Project.

This Petition is submitted in connection with the Agreement between the IID and the Authority. The Agreement describes a proposed project. Implementation of the project is contingent upon completion of an environmental review process, as required by CEQA and NEPA, as described above, and issuance of all necessary permits and approvals by state and federal agencies, including the SWRCB and the BOR. A "Summary of Agreement" is included at Section II to the Petition.

The project anticipates the implementation by the IID of conservation measures which will result in conserved water and the transfer of up to 200,000 AF of this conserved water to the Authority. The conservation methods to be implemented will be determined by the IID after completion and review of the environmental assessment. The conservation methods to be evaluated include on-farm measures and conveyance system measures.

On-farm conservation methods may include: (1) pump back systems; (2) improved water management techniques (irrigation scheduling, water measurement, soil monitoring); and/or (3) revised irrigation methods such as drip, sprinkler, and land leveling/land reshaping.

Conveyance system conservation methods may include: (1) construction of additional interceptors to collect operation spills from lateral canals; (2) reservoirs to match demand flows to delivery flows; and/or (3) seepage collectors to collect canal leakage/seepage and return it (pump back) to the same canal.

The conservation program is intended to reduce the deliveries of Colorado River water to farmland participating in the program. This quantity of conserved water would be available for transfer to the Authority. The conserved water will be diverted into the MWD's CRA at Lake Havasu for delivery to the Authority.

## 2. Governmental Requirements.

### Form Question 2.

The IID is currently in the process of organizing its environmental compliance team, who will then be in contact with state and local agencies, which will include Imperial County. Although at this time the IID does not believe that any permits will be required from Imperial County, the IID will supplement this response after it has initiated its contact with Imperial County regarding the project.

With respect to the County zoning designation, the on-farm conservation methods to be implemented in Imperial County will take place in areas zoned for agricultural uses. The IID is not certain of the zoning designation at the proposed point of diversion (Lake Havasu) or at the area of the change of place of use (San Diego County). To the extent that the SWRCB requires this information, the IID will supplement this response as requested.

### Form Question 3.

Although at this time the IID does not believe that any state or federal "permits" are required, the Agreement is contingent upon approval of the transfer of the conserved water by the SWRCB and BOR, as described in the Agreement. In addition, it is anticipated that consultation or approvals from the U.S. Fish & Wildlife Services and/or the California Department of Fish & Game or other resource agencies may be required with respect to project's impacts on endangered species or habitats.

### Form Question 4.

The IID and the Authority each filed and posted a Notice of Exemption pursuant to CEQA with respect to the execution of the Agreement in the Office of the County Clerks of Imperial, Riverside and San Diego Counties. Copies of these Notices are in the IID Appendix at Tab 13.

As set forth in the Agreement, a comprehensive environmental review of the project is planned, which includes the preparation of an EIR or a joint EIR/EIS. See the above "Environmental Process Summary" for a description of the environmental review process to be implemented. The IID is designated in the Agreement as the Lead

Agency for purposes of compliance with CEQA. The EIR (or joint EIR/EIS) will address the environmental impacts of the actions requested to be taken by the SWRCB in the Petition in conformance with CEQA and the State CEQA Guidelines, and the IID will consult with the SWRCB with respect to the preparation of the EIR (or a joint EIR/EIS) regarding any such impacts.

Form Question 5.

The IID will investigate the answer to this question during the environmental review process. Depending upon which methods are used to implement the proposed conservation efforts, it is possible that there will be effects on water quality when the project is implemented. For example, the IID already has identified that the proposed conservation efforts may result in a reduced discharge of agricultural drainage water to the drains and to the New and Alamo Rivers and ultimately to the Salton Sea, and that as a result of such reduction, there may be an increased concentration of salinity, selenium and other chemical constituents in drainage water flowing into the New and Alamo Rivers and into the Salton Sea. This impact could be potentially significant unless mitigated, and will be further studied and assessed in the EIR (or joint EIR/EIS) to be prepared.

The impact of each of the proposed conservation methods on water quality (and any other environmental effects) will be investigated as part of the environmental review process. If it is determined that the project may have a significant effect on water quality, this impact will be studied and assessed in the EIR (or joint EIR/EIS).

Form Question 6.

At this time, no archeological reports have been prepared for the project. The Initial Study required for the CEQA environmental review process is currently being prepared. If it is determined that the project may have a significant effect on archeological or historical sites, this impact will be studied, assessed and addressed in the EIR (or joint EIR/EIS). In addition, the IID will initiate a record search with the Southeastern Research Center (INC Desert Museum) to determine whether there are archeological or historic sites located within the general project area.

3. Environmental Setting.

Form Question 7. See IID Appendix, Tab 14.

Form Question 8.

The information requested will be ascertained during the environmental review process. In general, however, the general plant community type for the various project areas is as follows: the Imperial County area where the on-farm conservation methods will be implemented is "Developed Communities--Cropland;" the point of diversion at Lake Havasu is generally "Shrub Dominated Communities--Desert Scrub;" and the San Diego County area (change in place of use) is primarily "Developed Communities--Urban."

Form Question 9.

The information requested will be investigated during the environmental review process. If it is determined that the project may have a significant effect on trees and shrubs, this impact will be studied and assessed in the EIR (or joint EIR/EIS). In the past, removal of several cottonwoods or mesquites has been required in connection with the installation of lateral interceptors.

4. Fish And Wildlife Concerns.

Form Question 10.

The project's potential effect on fish and wildlife will be studied and assessed in the EIR (or joint EIR/EIS). At this time, a preliminary review of the project indicates that it may have the potential to impact certain endangered species, such as the desert pupfish, the razorback sucker or the Yuma clapper rail or their habitats. It is also possible that there may be an increased accumulation of selenium and other contaminants within the aquatic and avian food chains. See Item 5 above.

Form Question 11.

The project's potential effect on riparian and terrestrial wildlife will be studied and assessed in the EIR (or joint EIR/EIS). At this time, a preliminary review of the project indicates that it may impact wetland habitats within specific agricultural drainage channels as a result of the conservation measures located within the drainage area. In addition, wetland habitat around the mouths of the New and Alamo Rivers as well as those around the Salton Sea may be impacted by the conservation program. Minimal impacts to the wetland habitat in the

lower Colorado River may occur. The predominate riparian habitat that may be affected by the project is arrow weed and salt cedar.

Form Question 12.

At this time, it is not expected that the proposed changes will involve any construction or grading-related activity which has significantly altered or would significantly alter the bed or bank of any stream or lake.

## **IX. STATE LAW FAVORS THIS TRANSFER**

Water transfers are recognized as an important means of meeting California's increasing water demands without injuring the environment. Given substantial differences in water endowments among regions of the state, and significant variation in precipitation from year to year, California's development has necessitated large inter-basin transfers. For the first 70 years of this century, California met its increasing water needs by constructing large storage and diversion projects and moving water over massive distances. The urban coastal plain of Southern California, for example, satisfies less than a quarter of its water demand with water from local sources. The remainder of its water comes from the Colorado River via the Colorado River Aqueduct, from Inyo and Mono Counties through the Los Angeles Aqueduct, and from Northern California via the State Water Project. The continued growth in urban water demand, coupled with governmental mandates to retain more water in rivers and lakes for environmental purposes, has used up any surplus water supply that had been available in normal rainfall years. Today, the Southern California coastal plain and many other regions of the State face increasing water concerns.

### **A. The IID-Authority Transfer Is Supported By Statute.**

To address these issues, as early as 1979, the California Legislature began to enact a series of statutes that, taken together, mandate approval of the IID-Authority transfer. First, § 1011 allows an appropriative right holder to conserve water and to then transfer the conserved water without losing the underlying water right despite reduced use. Section 1011 unequivocally establishes that conservation of appropriated water constitutes a reasonable and beneficial use of the water by the water right holder:

When any person entitled to the use of water under an appropriative right fails to use all or any part of the water because of water conservation efforts, any cessation or reduction in the use of such appropriated water shall be deemed equivalent to a reasonable beneficial use of water . . . .

§ 1011(a). Such "deemed" reasonable beneficial use takes place at the location of the water conservation efforts since the resulting reduction in use is the deemed reasonable beneficial use.

The Legislature's statement in § 1011 that conservation "shall be deemed equivalent to a reasonable beneficial use of water to the extent of such cessation or reduction in use" is important. This language states that conservation itself constitutes a reasonable and beneficial use, thus providing that the "use" occurs where conserved. In other words, when the IID conserves the water which is to be transferred to the Authority, the IID is reasonably and beneficially using the water within the boundaries of the Imperial Irrigation District. Section 1011(b) then states that such water may be transferred. The statute was drafted to facilitate transfers such as that proposed by the Agreement. Thus, § 1011 provides a clear mandate for the SWRCB to approve the transfer under the terms of the Agreement.

The enactment of § 1011 was followed by a litany of statutes declaring and affirming the State's strong policy in favor of voluntary water transfers. For example, § 109, enacted in 1980, states:

(a) The Legislature hereby finds and declares that the growing water needs of the state require the use of water in an efficient manner and that the efficient use of water requires certainty in the definition of property rights to the use of water and transferability of such rights. It is hereby declared to be the established policy of this state to facilitate the voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import.

(b) The Legislature hereby directs the Department of Water Resources, the State Water Resources Control Board, and all other appropriate state agencies to encourage voluntary transfers of water and water rights . . .

If there were any doubt about the application of § 1011 to IID conservation, § 1012, enacted in 1984, is abundantly clear:

Notwithstanding any other provision of law, where a person, public agency, or agency of the United States undertakes any water conservation effort, either

separately or jointly with others entitled to delivery of water from the Colorado River under contracts with the United States, which results in reduced use of Colorado River water **within the Imperial Irrigation District**, no forfeiture, diminution, or impairment of the right to use the water conserved shall occur, except as set forth in the agreements between the parties and the United States.<sup>23</sup>

§ 1012 (Emphasis added.)

In 1986, the Legislature enacted additional statutes expressly designed to promote water transfers:

The Legislature hereby finds and declares that voluntary water transfers between water users can result in a more efficient use of water, benefiting both the buyer and the seller . . .

The Legislature further finds and declares that it is in the public interest to conserve all available water resources, and that this interest requires the coordinated assistance of state agencies for voluntary water transfers to allow more intensive use of developed water resources in a manner that fully protects the interests of other entities which have rights to, or rely on, the water covered by a proposed transfer.

§ 475.

The Legislature hereby finds and declares as follows: . . . .

(d) It is the policy of the state to facilitate the voluntary sale, lease, or exchange of water or water rights in order to promote efficient use. . . .

Deering's California Codes (Annotated), Note re "Stats. 1986 ch. 918" preceding the "Wheeling Statutes" at § 1810 et seq.

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<sup>23</sup> The uncodified portion of § 1012 states: "The Legislature finds and declares that the enactment of Section 1012 of the Water Code is intended to clarify and make specific existing California law in regard to water conservation measures which may be taken within the Imperial Valley. In enacting Section 1012 of the Water Code, it is not the intent of the Legislature to alter the relationship of state and federal law, as each may apply to the distribution and use of Colorado River water." (Emphasis added.)

B. The SWRCB Has Consistently Endorsed California's Pro-Transfer Policy.

The SWRCB expressed very strong support for the policy codified in § 1011, writing to the law's author, State Senator Rose Ann Vuich, in June of 1981:

I am pleased to tell you that the Board has implemented your bill effectively, yet with a minimum of new red tape. As you know, the new law allows an appropriator to retain the right to any surplus water created because water conservation measures were implemented. . . .

Your bill is clearly a step in the right direction of creating incentives for water conservation. We hope you will continue to support and author legislation that seeks to promote efficient and effective use of our scarce water supplies.<sup>24</sup>

In 1982, the SWRCB prepared a Bill Analysis of Assembly Bill 3491<sup>25</sup>, which contained an amendment to § 1011 allowing transfers of the conserved water. The SWRCB stated (emphasis added):

Under existing law, if water right holders cease or reduce use of water under an existing water right because of reclamation or conservation efforts, they do not forfeit the right. AB 3491 would make clear that saved water can be transferred. Although existing law allows these transfers, enactment of this provision would eliminate any uncertainty concerning this matter, and provide greater incentives for transfers.

The SWRCB supported AB 3491 because:

[T]he provisions of AB 3491 are designed either to encourage or facilitate market transfers of water, which was urged by the Governor's Commission to Review California Water Rights Law.

Id. p. 2.

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<sup>24</sup> IID Appendix, Tab 15 (June 23, 1981, letter from Stephanie Bradfield of SWRCB to The Honorable Rose Ann Vuich).

The SWRCB also recognized California's pro-transfer policy and, specifically, potential transfers by IID in its Decision 1600 and Order WR 88-20:

Water Code Section 1011 expressly authorizes the sale, lease, exchange or other transfer of water saved through conservation efforts. Under appropriate circumstances, the maximum beneficial use provision of Article X, Section 2 of the California Constitution may mandate the transfer of surplus water to water-short areas.

SWRCB Decision 1600 (IID Appendix, Tab 6 at pp. 17-18.)

[T]he California Water Code not only authorizes the voluntary transfer of water made available through implementation of conservation measures, but it actively encourages such transfers and protects the underlying water right of the agency which conserves the water.

SWRCB Order WR 88-20 (IID Appendix, Tab 7 at p. 39.)

In a Bill Analysis by the SWRCB<sup>26</sup> regarding § 1012, the SWRCB concluded that there was approximately 438,000 acre-feet of water which could be conserved in the IID:

There is a potential 438,000 acre-foot [sic] of water which could be conserved annually by IID if they have economic incentive for doing so. This bill helps provide that incentive.

In its analysis of § 1012 for the Enrolled Bill Report to the Governor<sup>27</sup>, the SWRCB again noted that existing law already guaranteed protection of the IID's appropriative rights:

Existing law provides that no forfeiture of an appropriative water right shall occur when the appropriator fails to use water because of water conservation efforts.

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<sup>25</sup> IID Appendix, Tab 16.

<sup>26</sup> IID Appendix, Tab 17.

<sup>27</sup> IID Appendix, Tab 18.

AB 2542 would enact language that would make this rule specifically applicable to any water conserved by the Imperial Irrigation District.

In other words, § 1012 just restated the conserved water safety net of § 1011, with specific application to the IID. This was confirmed by the Bill Analysis by the Department of Water Resources ("DWR") of Assembly Bill 2542 (which became § 1012), wherein the DWR stated that because of § 1011, "This bill is largely declaratory of existing law."<sup>28</sup> After indicating how § 1011 already allowed transfers of conserved water, the DWR concluded, "the bill is not legally necessary."

Id.

C. Sound Public Policy Underlies The Pro-Transfer Legislation And Supports Approval of the IID-Authority Transfer.

Water transfers are beneficial and important for a number of reasons. They create a new source of water to meet increasing demands. By the IID's conserving and transferring water, communities such as San Diego can help ensure that the Colorado River Aqueduct remains full and thereby avoid serious water shortages.

Voluntary water transfers play a similarly valuable adjustment role during droughts. By 1991, California recognized that new sources of water were necessary to avoid serious economic damage from the drought that had begun in 1987, and the state therefore created a drought water bank run by the DWR to encourage voluntary transfers. The 1991 drought water bank facilitated the transfer of 800,000 AF of water from areas that could reduce their water use to areas with important unmet demands, at a value of over \$111 million. The 1991 drought water bank was successful enough that the State ran drought water banks again in 1992 and 1994 (and formed and operated an options bank in 1995 before increased precipitation reduced water needs).

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<sup>28</sup> IID Appendix, Tab 19, p.1.

By providing a means of meeting the growing demands of urban regions of the State such as San Diego, voluntary water transfers can reduce the pressure to construct new water projects with their potential harmful environmental results, such as depleting rivers and other waterways. If transfers of Colorado River water are stifled, and the amount of water flowing through the Colorado River Aqueduct thus falls, pressures will mount to bring water into Southern California from elsewhere in California, and will put additional pressure on the San Francisco/San Joaquin Bay Delta.

Finally, voluntary water transfers can provide the financial resources that many water users need to engage in conservation. Water conservation can often require significant amounts of money and, without the revenues from voluntary transfers, many users cannot afford to employ additional and more expensive conservation measures. The SWRCB has recognized the symbiotic relationship between transfers and conservation:

In appropriate conditions, the [IID] conserved water presumably could be transferred directly to another party by agreement between IID and the other party.

SWRCB Decision 1600 (IID Appendix, Tab 6 at p. 16.)

This IID-Authority transfer is entirely consistent with goals and objectives of SWRCB Decision 1600 and Order 88-20 and California law. The SWRCB should approve the transfer as authorized and supported by state law, its own policies and numerous public policy pronouncements.

**X. IID APPENDIX OF EXHIBITS**

<b><u>Exh. Tab</u></b>	<b><u>Description of Document</u></b>
1	Agreement for Transfer of Conserved Water by and between Imperial Irrigation District, a California Irrigation District and San Diego County Water Authority, a California County Water Authority
2	Seven-Party Water Agreement of August 18, 1931
3	Applications by Imperial Irrigation District to Appropriate Unappropriated Water, and Permits Thereon
4	United States and Imperial Irrigation District Contract dated December 1, 1932
5	Agreement of Compromise Between Imperial Irrigation District and Coachella Valley County Water District dated February 14, 1934
6	State of California State Water Resources Control Board Decision 1600
7	State of California State Water Resources Control Board Order 88-20
8	March 28, 1989 Letter from Walter Pettit of the State Water Resources Control Board to Charles Shreves of the Imperial Irrigation District
9	June 29, 1998 letter from SWRCB to IID re conservation program compliance.
10	The California Water Plan Update, Bulletin 160-98, Volume 1 [Public Review Draft], cover page and pp. 6-14 to 6-20.
11	1996 Memorandum of Understanding Regarding Efficient Water Management Practices
12	Tentative Decision, Statement of Decision and Judgment in San Francisco Superior Court Action
13	Notices of Exemption
14	Photographs in response to Form Question 7(a), (b) and (c)
15	June 23, 1981 letter from Stephanie Bradfield of State Water Resources Control Board to the Honorable Rose Ann Vuich, California State Senate

- 16 Enrolled Bill Report from State Water Resources Control Board regarding AB 3491 dated August 24, 1982
- 17 Bill Analysis of AB 2542 by State Water Resources Control Board dated June 1, 1984
- 18 Bill Analysis of AB 2542 by State Water Resources Control Board dated April 17, 1984
- 19 Bill Analysis of AB 2542 by Department of Water Resources dated March 6, 1984
- 20 Maps showing existing and proposed points of diversion
- 21 Maps showing existing and proposed places of use
- 22 Maps of hydrologic basin of origin and streams potentially affected by the proposed changes
- 23 Names and address of person(s) taking water from the stream between the present point of diversion or rediversion, and the proposed point of diversion or rediversion, as well as any other person(s) known to IID who may be affected by the proposed change.
- 24 San Diego County Water Authority Water Resources Plan, February 1997

DATE:

IMPERIAL IRRIGATION DISTRICT

By \_\_\_\_\_

David L. Osias  
Attorney

DATE:

SAN DIEGO COUNTY WATER AUTHORITY

By \_\_\_\_\_

Scott S. Slater  
Attorney

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 501 W. Broadway, Suite 900, San Diego, CA 92101.

On July 21, 1998, I served the foregoing document by placing a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

Cal. Dept. of Fish and Game  
Environmental Services Division  
330 Golden Shore, Suite 50  
Long Beach, CA 90802  
Attn: Ronald D. Rempel, Regional Manager

\_\_\_\_\_ By Federal Express or other overnight delivery service, for delivery on the next business day.

I declare under penalty of perjury that the above is true and correct.

Executed on July 21, 1998, at San Diego, California.

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CATHERINE SCHIAFFO